The Civil Code Amendments of Act XVIII of 2004 Community of Property Arising from Succession

Dr. **Anthony Ellul** LL.D.

What follows is an analysis of Articles 45 and 46 of Act XVIII of 2004, which act continues to amend the Civil Code and which came into force on the first of March 2005 through Legal Notice 48 of 2005. Although the focus of this paper is the area of *Community of Property arising from Succession*, the amendments introduced in the Civil Code deal also with the issue of community of property which does not arise from succession, in that article 46 provides for an innovative procedure allowing co-owners of a determinate thing to alienate the thing co-owned despite the opposition of other co-owner(s). In this context one should keep in mind the following general principles:-

a) Co-owners have a right to their share in things co-owned;
b) A division should lead to an equal partition;
c) Licitation is an extraordinary and an exceptional remedy which is resorted to when the division cannot take place comfortably and without damage to the co-owners.[192]
d) In an inheritance scenario the patrimony is one, and consists not just of the assets and liabilities of the estate existant at the testator's death, but also of any acquisition made after, of any fruits which are collected, of improvements and of any expenses made by the co-heirs.

One of the aims of Legal Notice number 15 of 2003 is *"li jitratta wkoll dwar il-qasma ta' beni in komuni u jintroduci regoli li fil-prattika ghandhom isolvu ghadd ta' problemi li joriginaw mill-proprjeta' li tkun fil-komun"*. In the sitting of the House of

[192] [see judgments of the First Hall of the Civil Court given in the case M. Deguara vs R. Calleja et [Cit. no. 1637/1995PS] decided on the 3rd October 2003 and V. Camilleri et vs H. Pavia [Cit. no. 2238/2000TM] decided on the 20th March 2003].

Representatives of the 10th November 2003 [sitting number 53], Onor. Ministru Dr. Tonio Borg declared that:-

"Kemm hawn kawzi fil-qorti li ghadhom pendenti minhabba li l-wirt ma jkunx jista' jinqasam jew ghax hemm hafna nies jew inkella ghax ghalkemm hemm ftit nies, dawn ma jkunux iridu jirrangaw. Ghalhekk qed nghidu li meta jghaddi certu zmien u l-eredi ma jkunux qasmu, se jkun possibbli li kwalunkwe wiehed mill-eredi jbigh is-sehem tieghu indiviz minn xi oggett tal-wirt meta l-wirt ikun ghadu ma nqasamx".

Also in this sense, in a press declaration made that year it was said that Act XVIII was introducing new fundamental measures *"sabiex tiffacilita il-qsim tal-wirt meta jkun ghadda certu zmien u l-eredi jew il-ko-proprjetarji ma jkunux ftehmu kif se jaqsmu l-proprjeta', allura f'dawk ic-cirkostanzi:-*

a) fil-kaz ta' wirt, kull eredi ikun jista' jbiegh sehmu indiviz minn proprjeta' partikolari tal-wirt, minghajr il-htiega tal-qsim tal-wirt".

Article 495 of the Civil Code provides that:-

(1) Each co-owner has the full ownership of his share and of the profits or fruits thereof.

(2) He may freely alienate, assign, or hypothecate such share, and may also, subject to the provisions of article 912, substitute for himself another person in the enjoyment thereof, unless personal rights are concerned:

Provided that the effect of any alienation or hypothecation shall be restricted to that portion which may come to the co-owner on a partition.

Before the coming into force of these recent amendments, in an inheritance scenario, the only certainty was that an heir could freely dispose of an undivided share appertaining to him from the

inheritance. In such eventuality, the other heirs had the option to exercise the right of '*l-irkupru successorju*'. This right terminated upon the expiration of one month from the notification to the heirs of that transfer. If within such period they fail to declare their will to exercise such right [article 912 of the Civil Code]. It should be noted that although in the Bill it was being proposed that article 912 should cease to be applicable in the scenario contemplated in article 46 of the Act, this proposal was thereafter not included in Act XVIII.

There is diverging jurisprudence as to the validity of a sale of an undivided share made by an heir regarding particular property forming part of an inheritance which has not yet been liquidated and divided between the heirs.

a) In a partial judgement given by the First Hall of the Civil Court on the 18th of June of 2004 in the case **Maria Assunta Casha et vs Joseph Mary Cutajar et** [Cit. no. 874/02JA] (which hasn't as yet been appealed), the Court unequivocally declared that any transfer of an undivided share regarding various properties forming part of an inheritance not yet divided, is null. The Court argued that where an inheritance is still held in common, *"wiehed qatt ma jista' jkun cert li se jmissu mill-wirt parti minn dik il-proprjeta' immobiljari"* of which he transferred his share. In the case of **Giuseppe Chircop et vs George Portanier et**[193], dealing with a request to the Court to annul a sale of an undivided share of property forming part of the community of acquests which after the death of the wife hadn't been as yet liquidated and divided, the Court observed that article 495 of the Civil Code gave the right to a co-owner to transfer *"l-kwota ntellettwali tieghu fil-komunjoni* ***imma mhux*** *id-dritt li jiddisponi minn haga determinata li tappartieni lill-patrimonju komuni, u dana billi huwa ncert qabel id-divizjoni, lil min dik il-haga tista' tigi fid-divizjoni"*. The Court concluded that the sale of a share of a tenement forming part of a common patrimony is null *"ghaliex maghmulha kontra l-ligi, billi dina, kif*

[193] [Cit. no. 597/43] decided by the Civil Court on the 24th of January 1944

intqal, ma taghtix id-dritt lill-konsorti li jiddisponi minn haga determinata li tappartjeni lil-patrimonju komuni".

In other judgements the Court was of the opinion that the validity of a sale depended on whether the thing [or the transferred share of the particular immovable] was eventually transferred to the vendor. This implied that the sale was being made under the condition that the thing which was the subject of the sale was eventually transferred to the vendor when the division is made. In the case **Carmelo Sultana noe vs Nobbli Guido Sant Fournier et noe**[194], it was declared that:- *"Jekk imbaghad il-haga mibjugha tibqa' fil-kwota tal-bejjiegh, il-bejgh hu pienament effikaci; jekk tigi assenjata lill-kondivident iehor, il-bejgh ikun ineffikaci u l-kondivident li lilu tkun misset ikun jista' jirrevendikaha minghand ix-xerrej. Billi l-effett tad-divizjoni hu li l-kwota ideali tikkonkretizza ruha fil-kwota reali li tohrog mill-istess divizjoni, il-kondivident jitqies bhallikieku kien proprjetarju ta' din il-kwota reali sa mill-bidu tal-komunjoni u d-divizjoni 'serve a dare forma concreta e tangibile al diritto che (il condomino) aveva prima'".*

The case **Avukat Dr. Joseph Vella noe vs Teresa Bonnici et** [195] dealt with a demand by plaintiff that the defendants be ordered to appear for the publication of a deed of sale of a tenement after a promise of sale of the tenement had been concluded. It should be pointed out that third parties who weren't signatories to the preliminary agreement also had a share in the tenement that the tenement formed part of the community of acquests existing between the defendant and her deceased husband, and the preliminary agreement was signed by the wife and by one of the husband's heirs. In this particular case the Court refrained from declaring that the sale could not be concluded, but postponed the proceedings *sine die* until the action for the liquidation and division of the community of acquests was made. Reference was made to comments made by Italian authors[196] who are of the view that no distinction should be made between the alienation of an intellectual

[194] [Cit. Nru: 758/60] pronounced by the Court of Appeal on the 17th of March 1969
[195] [Cit. nru: 552/65] decided on the 14th of June 1967 by the First Hall of the Civil Court,
[196] [article 495 of the Civil Code is identical to article 679 of the Italian Civil Code of 1865]

share and that of a share of a determinate thing which is included in a common patrimony. The sale would be made under the implicit condition that the share was being assigned to the buyer when the division is made. This means that the sale would be ineffectual only if, when the division is made the object alienated is assigned to another co-owner. The position under the current Italian law is regulated by article 757, according to which *"ogni coerede e' reputato fin dall'apertura della successione solo e immediate successore nei beni della sua porzione, ed e' come se non avesse mai avuto diritti sugli altri beni ereditari. Alla natura dichiarativa e' connessa pertanto la retroattivita' degli effetti della divisione: tutti gli atti di disposizione compiuti da un coerede sopra beni che sono finite in mano d'altri rimangono inefficaci, e corripsondentemente ciascun coerede riceve I beni liberi da pesi eventualmente imposti da altri coeredi"* (*Istituzioni di Diritto Civile*, Alberto Trabucchi, Cedam, 1992, page 840).

In the case **Giuseppe Chircop et vs George Portanier et**[197], the Court ordered the suspension of procedings until the action for the liquidation and division of the community of acquests was completed, and thus revoked the judgement of the Court of First Instance [above quoted] which had declared the sale null. Professor Caruana Galizia seems to favour this thesis in that in his notes (page 20) he states that a co-owner can dispose independently of the other co-owners' share:- *"all this he can do independently of the other co-owners, but as no one can transfer a right which is greater than that which pertains to him, the acquirer succeeds in the same rights which the alienating co-owner had. The material effect of alienation is to be reduced to what the right of the alienating co-owner would be, had he not alienated it. In the text of Art.495 the effect of alienation is limited to that portion which may come to the co-owner on a partition"*.

As illustrated above, whatever thesis one chooses to apply, the problem remains that of uncertainty, in that everything is dependant upon the eventual division. With the introduction of

[197] Decided by the Court of Appeal on the 17th of April 1944 (Vol. XXXII.i.38)

article 45 and 46, the heirs have now the right to alienate particular property which forms part of the inheritance without the need to file an action for the division of the inheritance even if there lacks the consent of all the heirs.

Article 496 of the Civil Code has been amended by article 45 of Act XVIII which added sub-article 3 to the article. This sub-article provides that:-

"(3) Where the heirs in an inheritance continue to hold in common, property deriving from the succession for more than ten years and no action has been instituted before a court or other tribunal for the partition of the property within ten years from the opening of the succession and the portions of the heirs in the said inheritance are the same in respect of all the assets of the inheritance, each co-owner shall be deemed to be co-owner of each and every item of property so held in common".

This sub-article goes against what is provided in article 946 of the Civil Code. According to article 946:-

"*Each co-heir is deemed to have succeeded alone and directly to all the property comprised in his share, or come to him by licitation, and never to have had the ownership of the other hereditary property.*"

The practical effect of this article is that every co-owner is deemed to be a co-owner of everything comprised in that community and can resort to article 495A of the Civil Code [introduced by Act XVIII of 2004] so that a determinate thing can be sold without needing to liquidate and divide the inheritance, and would then receive his share from the price. This provision however is applicable only where:-

(A) The property originates from an inheritance;

(B) The property has been held in common between the heirs for a period longer than ten years and within ten years from the opening

of succession no procedures before the Court or Tribunal for the liquidation and division of the inheritance has been instituted. According to article 831 of the Civil Code, "A succession opens at the time of death..."

(C) The heirs' share in the inheritance has to be equal on all the assets. Interestingly, this condition was not included in the Bill.

Notwithstanding, the legislator provided in addition that this article does not apply where:-

[A] The common property is subject to a right of habitation, use or usufruct, until such right continues to exist;

[B] The property is of such nature that it must necessarily be kept undivided, such as a passage common between the heirs;

[C] The heirs otherwise agree;

Where the circumstance contemplated in article 45 of Act XVIII exist and therefore every heir is considered to be a co-owner of everything forming part of the inheritance, a demand may be made to the Court according to article 46 for the authorisation of the sale of particular property which forms part of the inheritance in the event that the co-owners cannot agree on the sale of the property. The practical effect of this article is the possibility in certain cases to have the partial division of the inheritance notwithstanding the opposition of any one of the heirs. The general principle is that property deriving from an inheritance cannot be partially divided, whilst if the property does not derive from the inheritance *"l-azzjoni tkun biss actio de communi dividendo u l-atturi jistghu jitolbu li l-art tinqasam bla ma jinqasmu wkoll beni ohra"* **(Emanuel Ellul et vs John Ellul et.)**[198]

[198] (Cit. Nru: 262/95GCD) decided by the First Hall of the Civil Court on the 30 of January 1997).

The amendments therefore seem to be changing this rule in that local jurisprudence confirms that one cannot partially divide except with the consent of all the heirs [see for instance **Emanuel Ellul et vs John Ellul et**[199]; **Terza Farrugia et vs Giuseppe Camilleri et**[200]; **Marianna Micallef et vs Vincenzo Borg noe et**[201]. In addition, the amendments gave authority to the Court to order, in case the demand to sell the property according to the procedure established in article 46 of the Act has been refused "*order the sale by licitation of the property in accordance with the provisions of articles 521 and 522 of the Code*." Such order can be given even where more than one co-owner opposes the sale.

In the Bill it was even being proposed that where more than one co-owner is opposing the sale, the Court compulsorily had to order the sale by licitation. One cannot forget that the general principle that to remove the community a division necessarily had to be made. Licitation is an extraordinary remedy, and the principle is that it cannot be resorted to where the property can easily be divided between the co-owners. It seems that with the introduction of article 495(A)(9) the legislator chose to depart from this fundamental rule.

The law seems to favour the will of the majority so long as the Court is satisfied that the objecting co-owner/s would not be "seriously prejudiced". The procedure contemplated by the law regarding the sale of property which forms part of an inheritance is the following:-

(A) The request to the court shall be made by application [Art. 495A(2) of the Civil Code];

(B) The application must be accompanied by [Art. 495A(2) of the Civil Code]:-

[199] (Cit. nru: 262/95GCD) decided on the 30th of January 1997
[200] (App. nru: 722/2001) decided by the Court of Appeal (Inferior/Sede Inferjuri) on the 10th of March 2004
[201] decided by the First Hall of the Civil Court on the 17 November 1878 (Vol. VI.662)]

(i) a declaration of the owners who agree to the sale;

(ii) a prospectus showing the number and value of the shares held by each of them;

(iii) the terms and conditions under which the sale is to take place

(iv) the date on which the co-ownership arose and the circumstances thereof;

(C) A copy of the application is to be published in the Gazette and in one daily newspaper. [Art. 495A(3) of the Civil Code];

(D) The application must be served on the co-owners who do not agree with the sale as well as on curators to be appointed by the court to represent such of the co-owners who are unknown or who cannot be traced. These may within twenty days from service upon them of the application oppose the sale stating the **serious prejudice** that they or the co-owners represented by them may suffer because of the sale. [Art. 495A(5) of the Civil Code].

The Court must weigh before it the value of the property in question, the selling price, as well as any other relevant factor when it is deciding whether one of the co-owners will suffer **severe prejudice**. In such case the Court has the power to appoint an expert so that an estimate of the property can be made [Art. 495 (A) (7)].

In my opinion these amendments may give rise to certain questions and other aspects that need to be clarified, among these:-

(a) The law does not stipulate under which Court the application for the authorisation of the sale should be done. In one of the sittings by the Permanent Committee for the Consideration of Draft Bills whilst the draft Bill was being discussed by Honourable Dr. Carmelo Mifsud Bonnici stated that such procedures should take place in front of the First Hall of the Civil Court.

(b) The law does not mention anything on whether there is a right of appeal against a decision by the Court regarding the plea of authorisation for the sale to be possible. Nonetheless it must be noted that once the Court's decision is final regarding the merit, it is subject to appeal - (Court of Appeal 31st January 2003-**George Grixti vs Josephine Micallef et proprio** [App. No. 320/99] (Interlocutory Decrees))- which dealt with an appeal on an interlocutory decree regarding Art. 258 Ch. 12.

(c) Since according to the amendments our law considers the heirs as co-owners in everything, it stands to reason that the amount resulting from a sale should be divided among the heirs according to their share. A situation may arise where one of the spouses receives money to which he or she is not entitled when a division takes place. This may arise for instance when such a person would have received a donation during the life of the deceased which is not exempt from collation.

(d) There is no definition of what constitutes '**severely prejudiced**'. Though it stands to reason that the Court may have discretion because of the varying circumstances of the case, the only factors mentioned which the Court should consider in every case in its decision are: the value of the property and the price proposed. A thorough reading of the law though suggests that the Court should not only consider such factors only. Should the fact that a property can be easily petitioned be reason enough for the Court to discuss a plea for the sale of property?

(e) In the case of immovable property the parties normally have to enter a promise of sale agreement before the publishing of the contract of sale is possible. In the amendments there is no reference to what can happen at this point.

(f) Can one of the co-owners offer to buy the common property himself or does the transfer always have to be with third parties who have no share in the property?

(g) Is it possible that the new system may lead to a situation where one of the co-owners may be deprived of the opportunity to participate in the dealings that take place with the buyer before a sale is affected?

(h) Articles 45 and 46 are applicable in the case where one of the spouses dies and the need for the liquidation of the Community of Acquests arises between the surviving spouse and the children who are the heirs of the deceased spouse?

(i) Would it not be fairer if the law would give a right of first preference to co-owners to buy common property before third parties when a demand is made to authorise the sale of common property?

(j) Article 46 stipulates that the sale should be authorised in accordance to the wishes of the majority. What should the course of action be in the case where those in favour and those against are equal in number? It seems that in this case the only course for the Court is to order a judicial sale by auction.

(k) Article 45 presumes that the heirs would have accepted the inheritance at least tacitly. What is to happen though in the case where one of the heirs has not yet accepted the inheritance?

I also have some doubts about the right the Court has to order a judicial sale by auction of a particular property rather than the sale. This arises mostly from the common knowledge that the judicial sale does not always work fairly and the rights of people can be violated in the local situation if the property sold does not recover its market value which in a country like Malta is dominated by land speculation. Nonetheless, this criticism can be mitigated because the amendment provides that all judicial sales by auction have to take place according to Article 521 of the Civil Code... "*it shall be carried out according to the rules laid down for judicial sales by auction,..., unless the court deems it more beneficial for the parties interested that it should be carried out otherwise*".

For the sake of equity it would have been better if an ad hoc system had been created to ensure that each co-owner would receive the fair share for his property.

I would like to stress once more the observation mentioned previously to the general rule that judicial sale by auction should only be resorted to where 'common property cannot be divided conveniently and without being injuriously affected, and compensation cannot be made with other common property of a different nature but of equal value', (Article 515 of the Civil Code).

There is no reference of this provision in sub-section 9 of Article 495A of the Civil Code, which gives the Court the right to order a judicial sale by auction.

The last point that I would briefly like to raise are the transitory dispositions found in Article 116(7) and (8) of the Act:-

(A) Article 45 applies only with regard to those successions that have opened way before 1st March 2005:-

(1) nine (9) years or more-one year after the coming into force of this Act (1st March 2006).

(2) Less than nine (9) years- Article 45 applies instantly.

(B) Article 46 only applies as regards that property which from 1st March 2005 was common:-

(1) a year after 1st March 2005 where that community has existed for nine (9) years or more.

In sitting no. 36 of the 10th December 2004 by the Permanent Committee for the Consideration of Draft Bills, Honourable Dr. Carmelo Mifsud Bonnici stated:-

'*We are providing for this year so that anyone who thinks that this applies to him has one year within which to proceed judicially'.*

(2) Immediately where the community is less than nine (9) years.

Anthony Ellul
April 2005

(Translated from Maltese to English by the 'Id-Dritt' Editorial Board - June 2006*)*